SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1354

RICHARD L. OELSCHLAEGER,

Petitioner,

v.

STEWART L. UDALL,
Secretary of the Interior, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SAMUEL W. McINTOSH
1266 National Press Building
Washington, D. C. 20004

JAMES W. McDADE
1266 National Press Building
Washington, D. C. 20004

Attorneys for Petitioner

Washington, D. C. - THIEL PRESS - 202 - 393-0625

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OPINIONS BELOW

The administrative decisions of the Department of the Interior are printed in the Appendix. The opinion of the Secretary of the Interior (Appendix, page 1), is officially reported in decisions of the United States Department of the Interior, *Richard L. Oelschlaeger*, 67 I.D. 237 (1960).

The United States District Court for the District of Columbia did not render an opinion. Order of that Court is printed in the Appendix (page 39).

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet officially reported. The opinion is printed in the Appendix (page 33).

JURISDICTION

Petitioner requests that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on January 23, 1968 (Appendix, page 33). The jurisdiction of this Court rests on 62 Stat. 929, 28 U.S.C. § 1254 (1).

The jurisdiction of the United States District Court for the District of Columbia was based on 28 U.S.C. § 1331, and 5 U.S.C. § 1009.* The subject matter jurisdiction of that Court was invoked under 43 U.S.C. §§ 161-263, and 48 U.S.C. §§ 371-378.

QUESTIONS PRESENTED

The questions presented which Petitioner asks this Court to review are:

(1) Was the decision of the Secretary of the Interior in this matter in harmony with the decision of this Court in *Borax Consolidated Ltd. v. City of Los Angeles*?[1]

(2) Was the decision of the United States Court of Appeals for the District of Columbia Circuit in harmony with opinions of this Court which hold that a reviewing court must judge the propriety of a determination or judgment made by an administrative agency solely on the grounds invoked by the agency?

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[1] 296 U.S. 10, 80 L. ed. 9 (1935).

*Now sec. 701 et seq.

(3) Was the decision of the United States Court of Appeals for the District of Columbia Circuit consistent with the holdings of this Court that the administrative process requires that courts reviewing the action of an administrative agency refrain from accepting counsel's post hoc rationalizations for agency action?

(4) Was Petitioner Oelschlaeger denied property without due process of law?

STATUTES INVOLVED

Article 4, Section 3, Clause 2 of the Constitution of the United States reads in pertinent part:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; . . ."

The Act of May 14, 1898, c. 299, § 1, 30 Stat. 409, as amended, U.S.C.A. Title 48, § 371 (1952 Ed.), reads in pertinent part as follows:

> "§ 371. Homestead laws extended to Alaska; locations on navigable waters; entries on unsurveyed lands
>
> "All the provisions of the homestead laws of the United States not in conflict with the provisions of this section, and all rights incident thereto, are extended to the Territory of Alaska, subject to such regulations as may be made by the Secretary of the Interior; . . ."

The Act of March 3, 1891, c. 561, § 5, 26 Stat. 1097, as amended, U.S.C.A. Title 43, § 161 (1964 Ed.), provides in part:

> "§ 161. Entry of unappropriated public lands
>
> "Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required

by the naturalization laws, shall be entitled to enter one-quarter section, or a less quantity, of unappropriated public lands, . . ."

The Act of June 6, 1912, c. 153, 37 Stat. 123, as amended, U.S.C.A. Title 43, § 164 (1964 Ed.), provides in part:

"§ 164. Certificate or patent; issuance

"No certificate shall be given or patent issued therefor until the expiration of three years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, . . . proves by himself and by two credible witnesses that he, she, or they have a habitable house upon the land and have actually resided upon and cultivated the same for the term of three years succeeding the time of filing the affidavit and makes affidavit that no part of such land has been alienated, except as provided in Section 174 of this title, and that he, she or they will bear true allegiance to the Government of the United States, then in such case he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law: . . ."

The Act of March 1, 1901, c. 674, 31 Stat. 847, as amended, U.S.C.A. Title 43, § 272 (1964 Ed.), provides in part:

"§ 272. Deduction of military and naval service from time required to perfect title; rights of widows and children of veterans

"The time which the homestead settler has served in the Army, Navy, or Marine Corps of the United States shall be deducted from the time otherwise required to perfect title, . . ."

The Act of February 18, 1875, c. 80, § 1, 18 Stat. 317, as amended, U.S.C.A. Title 43, § 2 (1964 Ed.), provides:

"§ 2. Duties concerning public lands

"The Secretary of the Interior, or such officer as he may designate shall perform all executive duties appertaining to the surveying and sale of the public

lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government."

PUBLIC LAND ORDER INVOLVED

Public Land Order 576 of April 6, 1949, 14 Fed. Reg. 1614, reads in pertinent part as follows:

"By virtue of the authority vested in the President and pursuant to Executive Order No. 9337 of April 24, 1943, 3 C.F.R. 1943 Cum. Supp., and section 4 of the Act of May 24, 1928, 45 Stat. 729 (49 U.S.C. 214), it is ordered as follows:

* * * * *

"Subject to valid existing rights and withdrawals, the public lands within the following described areas are herewith withdrawn from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and reserved as follows:

* * * * *

"(5) Under the jurisdiction of the Secretary of the Interior pending relocation of a portion of the Anchorage-Seward Highway:

Beginning at the southeast corner of sec. 33, T. 12 N., R. 3 W., S.M., thence by metes and bounds,

Southeasterly, 10 miles, parallel to and 1 mile distant from the line of mean high tide of Turnagain Arm, to the west boundary of Chugach National Forest;

South, 1 mile, along west boundary of the Forest to the line of mean high tide of Turnagain Arm;

Northwesterly, 11 miles along line of mean high tide of Turnagain Arm to meander corner on south boundary of sec. 32, T. 12 N., R. 3 W.,

East, 1¼ miles along south boundary of secs. 32 and 33 to point of beginning.

The area described contains approximately 6,700 acres."

STATEMENT OF THE CASE

By Public Land Order 576, dated April 6, 1949, 14 F.R. 1614, the Secretary of the Interior withdrew certain public lands of the United States in the then Territory of Alaska. That portion of the Public Land Order which is pertinent to this case withdrew lands described in the Order as "parallel to and 1 mile distant from the line of mean high tide of Turnagain Arm" for a purpose stated in the Order to be relocation of a highway. Turnagain Arm is a body of water off the coast of Alaska, bounding the coast of the withdrawn land (Appendix, page 3).

The withdrawn lands had not been surveyed at the date of publication of the Public Land Order.

In 1949, one Thomas N. Mely, and one Louis Oelschlaeger, step-father of the Petitioner herein, initiated homestead entries on unsurveyed public lands of the United States in the Territory of Alaska, in the general area of the withdrawn lands. The lands entered by Mely and Louis Oelschlaeger lie approximately equidistant from the water as the Richard Oelschlaeger homestead entry.

The Bureau of Land Management, a Bureau of the Department of the Interior, initiated a contest against the homestead entry of the said Thomas N. Mely, alleging that the lands entered by Mely were within the area withdrawn by Public Land Order 576. After involved and lengthy proceedings in the Bureau of Land Management (Appendix, page 11), a decision was issued by the Acting Manager of the United States Land Office, Anchorage, Alaska, which is an office of the Bureau of Land Management, dismissing the contest of the Bureau of Land Management against the Mely homestead entry upon the finding of fact made by the Acting Manager that the entry of Thomas N. Mely did not lie in whole or in part within the area withdrawn by Public Land Order 576 (Appendix, page 12). The Bureau of Land Management took no appeal from this dismissal of its contest against the Mely entry.

In March, 1954, after the dismissal of the Government's contest against the Mely entry, Petitioner Richard Oelschlaeger established residence upon a homestead claim on unsurveyed public lands of the United States in the Territory of Alaska. The Richard Oelschlaeger claim adjoins both the Mely claim and the Louis Oelschlaeger claim.

On October 28, 1954, a plat of survey was accepted, and thereafter officially filed on December 22, 1954, covering the lands embraced in these three homestead entries. On January 31, 1955, in response to a demand by the Anchorage Land Office dated January 17, 1955, Petitioner Richard Oelschlaeger filed a homestead entry application for surveyed lands describing, in accordance with the officially filed plat of survey, the lands originally entered.

On April 20, 1955, Petitioner filed his final proof, and submitted supplemental evidence supporting such final proof on June 14, 1955 and November 30, 1955.

On April 27, 1955, some five months after the filing of the plat of survey, a patent for public lands of the United States was issued by the Bureau of Land Management to Thomas N. Mely, covering his homestead claim.

On October 10, 1955, ten months after the filing of the plat of survey, a patent for public lands of the United States was issued by the Bureau of Land Management to Louis Oelschlaeger for his homestead claim.

On November 19, 1956, the Manager of the United States Land Office in Anchorage, Alaska, issued his decision rejecting Petitioner's homestead location notice, application to enter and final proof, on the basis that the lands covered by the entry were withdrawn by Public Land Order 576 (Appendix, page 31). Appeal was taken from this decision of rejection, and on October 23, 1959, the Director of the Bureau of Land Management issued his decision (Appendix, page 8) affirming the decision of the United States Land Office, Anchorage, Alaska. On Appeal, the Secretary of the Interior, acting through his Solicitor, issued his decision on June 27,

1960 (Appendix, page 1), affirming the decision of the Bureau of Land Management.

This action was commenced in the United States District Court for the District of Columbia by filing a complaint on December 29, 1960. The case came before the Court on February 14, 1967, on cross motions for summary judgment. The Court determined that the Department of the Interior had never made a finding, in accordance with its own Public Land Order, whether the lands entered by Petitioner Richard Oelschlaeger were within the area withdrawn. The Court therefore denied both motions for summary judgment and remanded the case to the Department of the Interior for a finding of whether the lands entered were within one mile of the line of mean high tide of Turnagain Arm, rather than a determination, which the Department had made, that the lands were within one mile of the surveyed meander line, based on the survey filed in 1954, some five years after the order of withdrawal (Appendix, page 39).

Thereafter, appeal was filed on behalf of the Secretary of the Interior. On January 23, 1968, the United States Court of Appeals for the District of Columbia Circuit rendered its opinion, reversing the judgment of the District Court, and remanding the case with directions to enter judgment for Respondents (Appendix, page 33).

REASONS FOR GRANTING THE WRIT

I.

The Administrative Decision Presented for Review Is in Conflict with the Holding of this Court in Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10, 80 L. ed. 9 (1935).[2]

In 1935, this Court considered the method for determining the boundary of lands where the upland meets the tideland. In *Borax*, it had been contended that a grant of uplands bordering on the tidelands was limited to the surveyed meander line as shown on the official Federal plat of survey. The Court dismissed that contention, and held that the tideland extended to the high water mark, which meant, not a physical mark made upon the ground by the water, but rather ". . . the line of high water as determined by the course of the tides." (296 U.S. 22).

Since 1935, so far as court decisions are concerned, there seems to have been little question but that *Borax* was applicable whenever the question of the boundary between uplands and tidelands was at issue. In *Hughes v. State of Washington*, __ U.S. __, 19 L. ed. 2d 530 (1967), the Court again considered the question relating to the line of ownership between uplands and tidelands. The Court reviewed *Borax*, and stated that while *Borax* was not concerned with accretions, it

> ". . . did involve the question as to what rights were conveyed by the Federal grant and decided that the extent of ownership under the Federal grant is governed by Federal law. This is as true whether doubt as to any boundary is based on a broad question as to the general definition of the shoreline or on a particularized problem relating to the ownership of accretion. See *United States v. Washington*, 294 Fed.

[2]This case will be hereafter referred to as *Borax*, and the line defined in the case as the *Borax* line.

2d 830, 832 (CA 9th Cir. 1961), cert. denied, 369 U.S. 817, 7 L. ed. 2d 783, 82 S. Ct. 828 (1962). We therefore find no significant difference between *Borax* and the present case."

Petitioner claimed throughout the administrative appeals that the area withdrawn by Public Land Order 576 must be measured from the boundary of the public lands, which is the line of mean high tide, as defined by *Borax*. Petitioner's claim was made on the specific wording of the order, i.e., "the line of mean high tide" and on the factual situation, i.e., from the date of publication of the land order in 1949 until the date of the filing of the official plat of survey, during which time Petitioner made his homestead entry, no other line was in existence from which the withdrawn lands could be measured.

The only concession in the Secretary's decision[3] that Petitioner had insisted the withdrawn area be measured from the *Borax* line is found in a footnote in the decision (Appendix, page 5). In that footnote, the Secretary dismisses the case of *Borax* and described the method outlined in that case for determining the line of mean high tide as a method "formerly" used by the Coast and Geodetic Survey. There is nothing in the decision to show how the Secretary arrived at this conclusion. It is a fact that at the very time the Secretary was dismissing this method for finding the line of mean high tide as one formerly used by the Coast and Geodetic Survey, the Secretary was involved in litigation urging that the *Borax* line be followed in the case of *United States v. Washington* (294 F.2d 830 (C.A. 9 Cir. 1961), cert. denied, 369 U.S. 817, 7 L. ed. 2d 783 (1962)).

The Secretary claimed no discretion in reaching his decision that for the purposes of a public land order, the line of mean high tide and the surveyed meander line were one and

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[3]The final administrative decision of the Department of the Interior is signed by the Deputy Solicitor under delegations recited therein (Appendix, page 00). The decision will be referred to throughout as that of the Secretary.

the same. Rather, he adopted and relied on the reasoning of the Director of the Bureau of Land Management in his earlier decision in the case.

The Director found that, in law, the line of mean high tide and the surveyed meander line were one and the same, and further found that the line described by *Borax* had no function in determining the boundary of public lands in an area such as this. He dismissed *Borax* in the following language:

> "The decision of the Supreme Court in the Borax case must, therefore, be limited in its application to the factual situation which gave rise to it; a dispute as to the exact boundary of very valuable lands no longer in the public domain." (Appendix, page 22).

The Director contended, as had been contended in the *Borax* case, that the filing of the plat of survey was conclusive as to the public lands in the area withdrawn, and that the meander line fixed the littoral boundary of the public lands. Having dismissed *Borax* as applicable only to the factual situation which gave rise to it, the Director concluded:

> "Since 1935, when the *Borax* case was decided, as before, the usual method of determining the littoral boundary of public lands has been to deduce it from the physical effect of the waters' action upon the land, rather than by measuring the depth of the high tide over a period of 18.6 years." (Appendix, page 22).

Thus, the Director concluded that the withdrawn area was to be measured from the boundary of the public lands, and that boundary was to be determined by observing the physical effect of the waters' action upon the land, and by depicting that action as a surveyed meander line on an officially filed plat of survey. The Director based his reasoning on a lengthy discussion, in which he insisted that Petitioner's claims amounted to a challenge of the system of public land surveys. He cited certain examples to support his conclusion,

one being an opinion of the Assistant Attorney General in 1900 (Appendix, page 18), and one being a statute enacted in 1957 (Appendix, page 20). In his citation of the statute, the Director found it necessary to omit certain words. A complete citation of the statute lends absolutely no authority to the Director's position, for correctly cited, the statute is as follows:

> "*For the purposes of this Act*, the line of mean high tide shall mean the meander line as heretofore established by government survey, or, in the event that such a survey has not been made, the present line of mean high tide * * *." Act of September 7, 1957, 71 Stat. 623, 48 U.S.C., 1952 Ed., Supp. V, § 455a. [Italicized words were omitted by Director.]

Nothing quoted by the Director, adopted and affirmed by the Secretary, lends any legal weight to the Director's contention that the withdrawal was to be measured from the boundary of the public lands, which boundary was determined by observing the physical action of the water on the soil, and marking that point as the surveyed meander line, from which the measurement was made.

The propriety of Petitioner's position is clear when it is remembered that from 1949, when the order of withdrawal was published, until 1954, when the plat of survey was filed, there was no line, except the *Borax* line, from which the withdrawn area could have properly been measured.

The administrative decision is legally wrong, and this was recognized by the District Court, in its order remanding the case to the Department of the Interior for proper determination.

II.

The Court of Appeals Did Not Base Its Ruling upon the Administrative Decision Presented.

The Court of Appeals, upon the brief and arguments presented, found an issue of language construction presented by this private claim against the public domain, and found that that issue was not resolved by *Borax*, which the Court found to be ". . . concerned with vastly different matters, i.e., the determination of boundaries as between tideland owners, on the one hand, and upland owners, on the other." (Appendix, page 37). The Court thus brought an issue into the case which was not presented nor considered by the administrative decision.

The administrative decision dismissed *Borax* as inapplicable in determining the littoral boundary of the public domain because (1) *Borax* described a method formerly used by the Coast and Geodetic Survey, and (2) the littoral boundary of the public domain was determined before and after *Borax* in the same manner, i.e., by determining the action of the water on the soil and depicting that action as a surveyed meander line. The decision claimed no discretion for the Secretary in interpreting his public land order, and noted no ambiguity in the order. The decision did not find an issue of language construction, but was rather based squarely on the Secretary's mistaken view of the law, as applied to the factual situation presented.

Public Land Order 576, withdrawing lands in the area of the Petitioner's homestead entry, was published in 1949. At that time, the area was not surveyed, and the Department of the Interior had to find a method for describing the withdrawn lands. Certain points in the area were known, i.e., there were surveyed corners of townships to the north of the withdrawn area. The Department therefore began its withdrawal at one of those surveyed corners, and proceeded in very general calls, southeasterly ten miles, parallel to and one mile distant from the line of mean high tide of Turna-

gain Arm. The call then proceeded south one mile along the west boundary of the Chugach National Forest, and then proceeded northwesterly, eleven miles along the line of mean high tide of Turnagain Arm, to a meander corner on the south boundary of the township to the north which had been surveyed.

At no point in the administrative proceeding was any of the language in the order an issue, except the phrase "line of mean high tide".

The administrative decisions show that both parties agreed that the withdrawn area was to be measured from the boundary of the public lands. The only disagreement was in the method of determining that boundary. It was never questioned in the administrative proceedings that a line proceeding southeasterly for ten miles would in fact arrive at the west boundary of Chugach National Forest, nor that a line proceeding south one mile along the west boundary of that Forest would in fact arrive at the line of mean high tide. All parties accepted the general nature of the language of the order because the lands were unsurveyed.

The rationale of the order of withdrawal is apparent when one considers the factual situation. There was no survey, and there were therefore no surveyed meander lines to follow. But the line of mean high tide, as defined in *Borax*, is, for all practical purposes, a permanent line, when derived on the basis of long term tidal observations alone.[4] It is apparent that the order, while in very general terms, was fixed to points from which the withdrawn area could be measured. Whenever the line of mean high tide was determined, the withdrawn area could be properly measured.

Some five years after the order of withdrawal, the Department of the Interior conducted a survey of the area and filed a plat of survey in late 1954. And it was on the basis of that plat of survey, and the Secretary's insistence that he might after the date of filing that plat, measure the with-

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[4]Shalowitz: *Shore and Sea Boundaries*, Vol. 1, p. 89.

drawn area from the surveyed meander line rather than the line of mean high tide, that the controversy arose.

The resolution of the controversy, so far as the Department of the Interior was concerned, is contained in the two decisions. Neither decision claims that there is an issue of language construction. Both decisions deny the applicability of *Borax* for determining the boundary of public lands in an area such as this, and the Secretary dismisses *Borax* as no longer in use. The Director insists that the littoral boundary of the public domain is determined now, as prior to *Borax*, by the determination of the action of the water on the land.

The administrative decisions therefore held that the withdrawn area was to begin at the boundary of the public lands, where those lands met the tidelands. The administrative decision insisted that the boundary was to be determined by the filing of a plat of survey.[5] The Director had no hesitation in stating, in fact, as if in answer to the question of language construction:

> "But the answer to this [Petitioner's contention that the *Borax* line should govern], in the light of the foregoing discussion, is that the determination of the line of mean high tide, in the technical sense meant by the Appellants, has no bearing upon the resolution of this case; although useful for certain purposes, it would not affect or establish the location of the boundary of the public lands. The phrase 'line of mean high tide' in a public land order, means only 'boundary of the public land' or 'meander line'." (Appendix, page 23).

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[5]The Department of the Interior seems to be asserting again a principle which has been consistently denied by this Court, i.e., that it may determine ownership through surveys of public lands. For if the theory of the Director is correct, the Department has determined the boundary of the public lands of the United States and the tidelands of the State of Alaska. This is not permitted. See *United States v. State Investment Company*, 264 U.S. 206, 68 L. ed. 639 (1924).

Thus, in the administrative decision, there was no question of language construction.

Whether ruling for or against an agency, the reviewing court is limited to those grounds put forth by the agency as a basis for its action. If the grounds invoked by the agency are inadequate or improper, or plainly contrary to law, the reviewing court is powerless to affirm the administrative action (*Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 9 L. ed. 2d 207 (1962). The Court of Appeals did not consider the grounds invoked by the Department of the Interior, but rather substituted an issue of language construction, on which it found reason to reverse the judgment of the District Court.

III.

The Court of Appeals Adopted and Ruled on Counsel's Post Hoc Rationalizations Rather than the Administrative Decision Presented.

The decision of the Secretary is based squarely on a mistaken view of the law, i.e., that the *Borax* line would not represent the boundary of public lands, but rather that the boundary of such lands is determined by observing the action of the water on the soil, and meandering that line.

Counsel for the Secretary, in both brief and oral argument in the Court of Appeals, emphasized the discretion of the Secretary of the Interior in dealing with certain statutes relating to the public lands. He cited, as did the Court of Appeals, the recent decision of this Court in *Udall v. Tallman*, 380 U.S. 1, 13 L. ed. 2d 616 (1965). Counsel for the Secretary freely admitted that there were two lines, and that the *Borax* line did in fact fix the boundary of the public lands in an area such as this. But Counsel insisted that the Secretary, in his discretion, might interpret his public land order to mean surveyed meander line, rather than line of mean high tide.

While citing only cases which refer to functions of the Secretary which are admittedly discretionary, i.e., oil and gas leasing, Counsel for the Secretary nevertheless urged that there were many aspects of the public land order in question which clearly indicated that the Secretary intended the surveyed meander line rather than the line of mean high tide. Counsel insisted that the construction of the public land order followed by the District Court contradicted specific language found on the face of the order and conflicted with the physical facts. He insisted that it would be difficult for cadastral engineers to find the withdrawn area on the ground, if the ruling of the District Court were followed. And he insisted that the phrase "line of mean high tide" would reasonably be interpreted by a cadastral engineer as referring to the surveyor's meander line.

Counsel for the Secretary emphasized that the public land order uses the phrase "meander corner" as one of the termini of the line, and that the distances from fixed points in the order more nearly coincided with the subsequently surveyed meander line, and were at variance with the line provided by the District Court's ruling. Counsel did not pursue his argument and show to the Court a drawing of the withdrawn area beginning at the meander corner, but rather insisted on showing only the coincidence of the distances from the point where the order of the withdrawal leaves the west boundary of the forest and proceeds northwesterly.

The decision of the Court of Appeals indicates without question that the Court was impressed with Counsel's argument that the use of the term "meander corner" was significant, and ". . . sufficient to turn aside a claim of utter arbitrariness." (Appendix, page 36).

It is fair to state that there is not one reference in the administrative decisions to a claim of discretion by the Secretary of the Interior in this matter, and it is also fair to state that the Secretary claimed neither an issue of language construction, nor did he claim any language in the order to show that he intended the order of withdrawal to be measured

from the surveyed meander line. Neither the Secretary nor the Director pointed to any ambiguities in the order.

Rather, and repetitiously, the Secretary claimed that in law the line of mean high tide and the surveyed meander line were one and the same; that an area withdrawn from the boundary of the public domain, not surveyed, could be thereafter measured from the surveyed meander line, since that line had been determined by a finding of the littoral boundary of the public domain, i.e., by a determination of the waters' action on the soil.

Whether the Secretary might have made a claim of discretion, and whether the Secretary might have claimed ambiguities in his order of withdrawal in order to support his ruling, is not important. The fact is that he made no such claim, and there are no ambiguities.

The Court of Appeals thus refused to rule on the Secretary's contention that *Borax* was not applicable for the reasons stated by the Secretary. Rather, the Court of Appeals substituted an issue of language construction, and ruled on Counsel's arguments of what the Secretary might have said. The Court refused to affirm the administrative action on the grounds stated in the decisions, i.e., that the line of mean high tide and the surveyed meander line were one and the same, to be determined by an observation of the waters' action on the soil.

The Court thus substituted its own discretion and Counsel's arguments for agency action. Such action does not vindicate, but rather deprecates, the administrative process. It propels the Court into the domain set aside exclusively for the administrative agency. *National Labor Relations Board v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 13 L. ed. 2d 951 (1965).

IV.

Petitioner Has Been Denied Property Without Due Process of Law.

The right to enter public lands of the United States and to establish residence thereon, to cultivate the lands, and finally to obtain a patent covering the lands, is a right granted citizens of the United States by the Congress in its role as proprietor of the public lands. The right is derived from statute—not from rules or regulations of the Department of the Interior.

While it is not doubted that the Secretary of the Interior, in administering certain statutes relating to the public lands, has been given wide discretionary authority in that administration (cf. Mineral Leasing Act (Act February 25, 1920, Chapter 85, § 1, 41 Stat. 437, as amended, U.S.C. Title 30, § 181 et seq.)), it is equally true that other statutes which the Secretary administers do not grant him discretionary authority.

The Courts defer to the Secretary's expertise in interpretation and construction of the statutes and regulations relating to the public land laws. But the necessity to construe a statute in order to perform administrative duties does not necessarily make such a performance a matter of judgment and discretion (*Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 74 L. ed. 809 (1930)). The Secretary's powers and duties differ in the administration of different statutes. No broad rule could be laid down which would be applicable to all statutes administered by the Secretary under the Congressional grant.

There are certain basic rules which have developed over a long period during which the public land laws have been administered by the Secretary of the Interior. Some of those rules relate specifically to the administration of the public land laws, while others relate generally to the area of administrative decision making. The most careful consideration

must be given to all rules laid down by this Court which are applicable in a situation where the Secretary of the Interior attempts to deprive a homestead entryman of his statutory right to the lands entered (*Ard v. Brandon*, 156 U.S. 537, 39 L. ed. 524 (1895)).

In the first place, the Secretary is bound by the law and by his own rules and regulations promulgated pursuant to law. (*Udall v. Tallman, supra*). That the public land order in question, withdrawing certain lands in the area of Petitioner's homestead entry, falls within the category of regulations having the force and effect of law is not doubted.

The fact that there is a statutory provision placing the administrative execution of a public land law under the supervision and direction of the Secretary of the Interior does not clothe the Secretary with any discretion to enlarge or curtail the rights of the grantee under the law, or to substitute his judgment for the will of the Congress as manifested in the granting act. (*Payne v. Central Pacific Railroad Co.*, 255 U.S. 228, 65 L. ed. 598 (1921)).

When Petitioner entered the public lands of the United States in question to establish his homestead thereon, whether the lands were withdrawn from such entry was a question of fact to be determined according to law. The only determination of record (the *Mely* decision, Appendix, page 12) placed the entry outside the withdrawn area. The *Mely* decision was based upon a finding of fact that the lands were not within one mile of the line of mean high tide.

The Manager of the Land Office thereafter changed the determination in the *Mely* case, and, after the filing of the plat of survey, construed the withdrawn area according to the plat of survey, measuring the withdrawal from the surveyed meander line rather than the line of mean high tide. The Director of the Bureau of Land Management and the Secretary of the Interior upheld this finding on the basis that:

(a) in law, the line of mean high tide and the surveyed meander line were one and the same;

(b) the official of the Interior Department who made the ruling in the *Mely* case was mistaken;

(c) the *Borax* case, describing what the Secretary called a method formerly used by the Coast and Geodetic Survey, was not applicable, since the boundary of the public lands was to be determined now, as prior to *Borax*, by an observation of the action of the water on the soil, and the platting of that line as a surveyed meander line.

Through Counsel, the Secretary then appeared in Court, requested the Court to overlook his reference to *Borax* as a method formerly used, acknowledged the existence of the *Borax* line as the boundary of the public lands, and requested the Court to confirm his action on the basis of his virtually unlimited discretion in administering certain statutes, citing the Mineral Leasing Act, *supra*.

Petitioner was at all times denied an administrative hearing. The Secretary based his denial on his finding that "the assertions on appeal do not raise issues of fact which require a hearing for determination." (Appendix, page 7). The Secretary thus converted, by interpretation, a question of fact requiring proof, into a conclusive presumption dispensing with proof and precluding dispute, and denied any hearing as to his interpretation. This Court has held that action of this nature transcends administrative power (*Miller v. United States*, 294 U.S. 435, 79 L. ed. 977 (1936)).

In view of the statute under which Petitioner claimed his right to homestead entry, whether the lands were open to such entry was a question of fact, based on proper legal principles. The Secretary, by interpretation of a public land order, changed without hearing that which should have been a finding of fact by an impartial tribunal, as in the *Mely* case, into a conclusive presumption. Whether the Secretary has any discretion to change the terms of an order of withdrawal by interpretation, and therefore deny a statutory right to homestead, is not the complete question. The Secretary

denied, by his action, Petitioner's right to property, and thus violated the due process guarantee.

Petitioner was further denied the guarantees of due process by the standards of review imposed in the opinion of the Court of Appeals. There had been a refusal for an administrative hearing, and there had been a conversion of a finding of fact into a conclusive presumption. Certainly the standards of review are not limited to a finding that the Secretary's decision is not utterly arbitrary. The proper standard of review is a complete and impartial inquiry into the conclusions of law of the administrative decisions, and an application of those conclusions, de novo, to the factual situation presented at the time Petitioner made his homestead entry. This is undoubtedly the standard adopted by the District Court, and this is the correct standard, in order to ensure that Petitioner is the beneficiary of the fundamental guarantee of fair play in due process (*Clark v. Herington*, 186 U.S. 206, 46 L. ed. 1128 (1902); *El Paso Brick Company v. McKnight*, 233 U.S. 250, 58 L. ed. 943 (1914)).

In arguments presented to the Court of Appeals, great emphasis was placed by Counsel for the Secretary on the area of land which would have been withdrawn under Petitioner's theory that the withdrawn area must be measured in the exact terms of the order of withdrawal. Counsel for the Secretary stated that the *Borax* line would have withdrawn lands inconsistent with the purposes of the order of withdrawal in aid of highway construction. Counsel did not offer any proof of such contentions, nor did Counsel attempt to show the relevancy of such contentions. For the fact is that the highway construction was completed in 1952 (Appendix, page 27), some two years before Petitioner made his homestead entry. The fact is that the record shows no difficulty in the completion of the highway. The more important fact is that the record indicates no reason for the continued existence of the withdrawal in 1954, after completion of the highway in 1952.

The most important fact is that, so far as can be determined, the Secretary's decision in this case, denying Petitioner's right to his homestead entry, seems to be the only interpretation of record in connection with this public land order after the decision in the *Mely* case. Thus, it is fair to state in conclusion that the sole purpose of the Secretary's interpretation of his public land order was to deny Petitioner's right to receive a patent for these public lands.

The violations of the fundamentals of due process, i.e., a hearing before an impartial tribunal in the administrative process[6], determination of factual matters as such, rather than a conversion of such matters to conclusive presumption[7], and fair play[8], are complete in this administrative record.

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[6] *St. Joseph Stock Yards Company v. United States*, 298 U.S. 38, 80 L. ed. 1033 (1936).

[7] *Miller v. United States, supra.*

[8] *Slochower v. Board of Higher Education of the City of New York*, 350 U.S. 551, 100 L. ed. 692 (1956); *Hannah v. Larche*, 363 U.S. 420, 4 L. ed. 2d 1307 (1960).

In addition, the interpretation of the public land order in such a manner to deny the homestead, and for that purpose alone, is sufficient basis in and of itself for a finding by this Court that the administrative process, and the manner of the judicial review of that process, served to deprive Petitioner of property to which he was entitled, from the date of his original homestead entry, at which time in law, the lands were available for such entry.

For all the above reasons, it is requested that the writ issue.

Respectfully submitted,

SAMUEL W. McINTOSH
1266 National Press Building
Washington, D. C. 20004

JAMES W. McDADE
1266 National Press Building
Washington, D. C. 20004

Attorneys for Petitioner

APPENDIX

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RICHARD L. OELSCHLAEGER
A-28299 Decided Jun 27 1960

Surveys of Public Lands: Generally—Boundaries

Where an order withdrawing a tract of unsurveyed land from entry gives the line of mean high tide of a branch of an inlet as one of the boundaries of the withdrawn area, the meander line which is run in surveying the area in accordance with the mean high water line is to be regarded as the equivalent of the line of mean high tide in establishing the littoral boundary of the withdrawn area.

Homesteads (Ordinary): Lands Subject To

Land which is withdrawn from entry under the public land laws is not subject to settlement or to the initiation of any claim under the homestead laws even though other land in the same withdrawal may have erroneously been patended under the homestead law.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

A-28299

Richard L. Oelschlaeger : Anchorage 026482.
: Settlement location
: notice rejected; ap-
: plication for homestead
: entry and final proof
: rejected.
: Affirmed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Richard L. Oelschlaeger has appealed to the Secretary of the Interior from a decision of October 23, 1959, by the Director of the Bureau of Land Management[1] affirming a decision by the manager of the Anchorage land office rejecting the appellant's settlement location notice, his application for homestead entry, and his final proof papers on 100 acres of land in secs. 3 and 10, T. 11 N., R. 3 W., S. M., Alaska.[2] The plat of survey of this land was accepted on October 28, and filed on December 22, 1954, but when the appellant filed his settlement location notice on April 21, 1954, an official plat of survey had not yet been filed and the land was therefore classified as unsurveyed.

By decision of November 19, 1956, the manager rejected the appellant's settlement location notice, his homestead

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[1] The Director's decision also involved an entry by one other person who did not appeal to the Secretary.

[2] A settler on Alaskan land is required by statute to file, in the district land office where the land is situated, notice of settlement within 90 days after settlement (48 U.S.C., 1958 ed., sec. 371 *et seq.*, 43 CFR 64.3).

entry application filed on January 31, 1955, and final proof papers filed on April 20 and June 14, 1955, for the reason that when the appellant initiated settlement on the land, it was withdrawn from entry under the public land laws in accordance with Public Land Order 576 of March 29, 1949 (43 CFR, 1953 Supp., p. 258; 14 F. R. 1614). Public Land Order 576, in part here material, withdrew from all forms of appropriation under the public land laws and reserved, under the jurisdiction of the Secretary of the Interior pending relocation of a portion of the Anchorage-Seward highway, the "public lands" within the following described area:

> "Beginning at the southeast corner of sec. 33, T. 12 N., R. 3 W., S. M., thence by metes and bounds,
>
> "Southeasterly, 10 miles parallel to and 1 mile distant from the line of mean high tide of Turnagain Arm, to the west boundary of Chugach National Forest;
>
> "South, 1 mile, along west boundary of the Forest to the line of mean high tide of Turnagain Arm;
>
> "Northwesterly, 11 miles along line of mean high tide of Turnagain Arm to meander corner on south boundary of sec. 32, T. 12 N., R. 3 W.
>
> "East, 1¼ miles along south boundary of secs. 32 and 33 to point of beginning."

The tract of public land, ten miles in length, withdrawn by this order is bounded on the west by the "line of mean high tide" of Turnagain Arm, a cove branching off Cook Inlet, and the eastern boundary of the withdrawn area is a line one mile inland from and parallel to the mean high tide line of Turnagain Arm. Between the upland and the line of low tide of Turnagain Arm, broad level mud flats extend for a distance estimated at from 3 to 5 miles, and these flats, covered and uncovered by the flow and ebb of the tide, are tidelands. As tidelands are not public lands, they are excluded from the area withdrawn by P. L. O. 576 (*Shively v. Bowlby*, 152 U.S. 1 (1894), *Mann v. Tacoma Land Company*, 153 U.S. 273 (1894)).

The exact boundaries of the withdrawn area could not be determined and adjusted to the lines of legal subdivisions until after the land was surveyed (see Instructions, "Survey of Lands Withdrawn While Unsurveyed", 42 L. D. 318 (1913)). In a memorandum of November 8, 1954, from the Director to the Area Administrator, Area 4, Anchorage, with respect to the adjustment of P. L. O. 576 (and of another reserve not here relevant) to the lines of legal subdivision in T. 11 N., R. 3 W., S. M., Alaska, as shown by plats of the survey of this township accepted on October 28, 1954, the public land in the above-quoted portion of P. L. O. 576 was described by legal subdivision. The manager's rejection of the appellant's homestead claim was based upon the memorandum of November 8, 1954, which indicated that the land for which the appellant applied was withdrawn by P. L. O. 576.

On this appeal it is contended, in effect, that the location of the western boundary of the land withdrawn by P. L. O. 576 was improperly determined and, as a consequence, the entire area withdrawn by the order is incorrectly described in the Director's memorandum of November 8, 1954. In support of this contention it is argued that the plat of survey of the area upon which the memorandum of November 8, 1954, is based does not indicate the line of mean high tide of Turnagain Arm, but only the meander line along Turnagain Arm and that the determination of the boundaries of the withdrawn area improperly used the meander line rather than the line of mean high tide as required by the order in establishing the western boundary of the withdrawn area.

The Director's decision discussed in detail the reasons for concluding that the phrase "line of mean high tide" in P. L. O. 576 is used in the same way and as the equivalent of the phrase "ordinary high tide", "High water mark", "high water line" and similar phrases which, in public land orders, signify that line which is meandered by the cadastral engineers in accordance with practices developed in the survey of areas

bordering water and in establishing boundary lines of unsurveyed areas over a long period of time. In running the meander line it has been the practice of the cadastral engineers to find the mean high water elevation by evidence of the water's action on the soil.[3] The Director's decision held that the meander line is equivalent to the line of mean high tide for determining the extent and the boundaries of the withdrawal. This ruling in the Director's decision is amply supported by examples of a similar administrative interpretation of comparable phrases in land descriptions used both by Congress and by this Department over a period of many years, and nothing on this appeal provides any basis for modifying the ruling.

The principal argument in support of this appeal is that two entries have been patented under the homestead laws on lands portions of which were withdrawn by P. L. O. 576 as described in the Director's memorandum of November 8, 1954. These two entries were initiated by settlement on the land shortly after the withdrawal order was issued and approximately 5 years before the plat of survey was accepted and filed. The entries referred to are Anchorage 015927 by Thomas N. Mely, whose settlement dated from May 7, 1949, and whose entry was patented on April 27, 1955, and Anchorage 018722 by Louis Oelschlaeger, father of the appellant, who settled on August 4, 1949, on land for which he received homestead patent on October 10, 1955. Since

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[3] Manual of Instructions For the Survey of The Public Lands of the United States (Washington, 1947) pp. 231-232.

On appeal it is argued, *inter alia*, that the use of the phrase "mean high tide line" requires that the line be determined by proper scientific measurements although there is no indication of what constitutes such measurements. The Director's decision mentions a number of reasons why the Bureau, in interpreting the phrase "mean high tide line", is not bound by one of the methods formerly used by the Coast and Geodetic Survey and approved by the Supreme Court in *Borax Consolidated Ltd. v. Los Angeles*, 296 U.S. 10, 26-27 (1935). This method consisted in finding the average height of all the high waters at a given place over an average period of 18.6 years.

these two entries in large part appear to be within the area withdrawn by P. L. O. 576 from entry under the public land laws, and were initiated after the withdrawal order was issued, the appellant contends that the United States is estopped from rejecting the appellant's application.

The contention is without merit. The Director's decision pointed out that the Mely entry was allowed as a result of a decision of September 3, 1953, by the acting manager which ante-dated the acceptance and filing of the plat of survey and which concluded that Mely's entry was made on land subject to homestead settlement. In the decision of September 3, 1953, after a hearing involving the validity of the Mely entry, the acting manager stated as a finding of fact that:

> "* * * the evidence shows that the Thomas N. Mely homestead, as described in his petition filed under Anchorage Serial No. 015927, does not lie, either in whole or in part, within a distance of one mile from the line of mean high tide of Turnagain Arm, and hence is not in conflict with P. L. O. 576 * * *".

This finding may have represented the opinion of the acting manager as to where the line of mean high tide, and consequently the inland boundary of the withdrawn land, lay but it could not bind or affect the Director of the Bureau in his determination of November 8, 1954, describing by legal subdivisions, the land so withdrawn since the approved plat of survey in the official and binding determination thereof (*Knight v. United States Land Association*, 142 U.S. 161, 176 (1891)). The Director's determination of November 8, 1954, indicated that the acting manager's decision of September 3, 1953, was erroneous insofar as it concluded that Mely's entry did not include lands withdrawn from entry under the public land laws. Likewise, the records on this appeal indicate that the allowance and patenting of the Louis Oelschlaeger entry, a portion of which is within the withdrawn area as described on November 8, 1954, appears

to have been plainly erroneous to the extent that the entry covers land withdrawn under P. L. O. 576.

The allowance and patenting of a substantial portion of the two entries just referred to, while improper, could create no rights in the appellant to the land on which he attempted to settle at a time when it was not open to settlement. Land which is withdrawn from entry under the public land laws is not subject to settlement or to the initiation of any claims under the homestead laws (*Catherine Blankenburg,* A-25947) (December 7, 1950); *Rafael D. Tobar,* A-27008 (December 13, 1954); *Anne v. Hestnes* A-27096 (June 27, 1955); *Lewis Sanford Cass,* A-27742 (January 14, 1959)). As the record in this case indicated clearly that the land for which the appellant seeks homestead patent was withdrawn from entry when he attempted to settle there, the rejection of his settlement location notice, his application for homestead entry, and his final proof papers was correct.

The request on behalf of the appellant for a hearing on a number of matters relating to the propriety of P. L. O. 576 is denied. The assertions on appeal do not raise issues of fact which require a hearing for determination (see *Lewis Sanford Cass, supra*). Furthermore the Department has held that even where a withdrawal is erroneously made to include land not intended to be embraced therein, it is nevertheless effective as to such land, and unless and until the land is released from withdrawal no rights inconsistent therewith will be recognized as attaching to any of the land actually withdrawn (*Ira J. Newton,* 36 L. D. 271 (1908)).

For the reasons mentioned herein and in the Director's decision, the rejection of the appellant's settlement location notice, his application for homestead entry, and final proof papers was correct.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F. R. 1348), the decision of

the Director of the Bureau of Land Management is affirmed.

GEORGE W. ABBOTT
The Solicitor

By: (Sgd) Edmund T. Fritz
Edmund T. Fritz
Deputy Solicitor

PUBLIC LANDS * 3 Boundaries and Surveys
* 7 Withdrawals

WORDS AND PHRASES * 1 Generally (Line of Mean High Tide)

A public land order withdrawing from all forms of appropriation under the public land laws an unsurveyed strip of land one mile wide, one boundary of which is "the line of mean high tide," and the opposite boundary of which is a line, "parallel to and one mile distant from the line of mean high tide," describes the withdrawn area with sufficient precision so that the publication of the order in the Federal Register constitutes constructive notice of the withdrawal to all persons affected thereby, and precludes the acquisition of any rights to the land by a person subsequently settling on any portion of the withdrawn area.

The phrase, "line of mean high tide" is used in Public Land Orders to signify that line which would be meandered by the cadastral engineer in accordance with practices developed when the same line was designated by such terms as "line of ordinary high tide," "high water mark," "high water line," "that part of the shore of the sea to which the waves ordinarily reach when the tide is at its highest," and similar phrases.

The practice in public land surveys of running a meander line with reference to the physical effect of the water's action upon the land, as evidenced by the presence of an escarpment, or the absence of vegetation, is a correct procedure, having the sanction of long usage.

A meander line as depicted on the plat of a correctly executed survey of littoral areas is conclusive as to the limits of the public lands, and binds all agents of the Bureau, until such time as it is amended or corrected by competent authority.

Robert Omar Pennington, Richard L. Oelschlaeger, Anchorage 024014, 026482 (October 23, 1959)

In reply refer to:
Anchorage 024014
026482
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

October 23, 1959

Certified Mail
Return Receipt Requested

DECISION

Robert Omar Pennington Richard L. Oelschlaeger	:	Homestead

Manager's Decision Affirmed

Richard L. Oelschlaeger and Robert Omar Pennington have appealed to the Director of the Bureau of Land Management from decisions of the Manager of the Anchorage, Alaska, Land Office, rejecting their notices of location for homestead settlements, their applications for homestead entry, and their offers of final proof, on the ground that the lands applied for were withdrawn from all forms of appropriation under the public land laws by Public Land Order 576.

Public Land Order 576 was published in the Federal Register (14 F.R. 1614) on April 6, 1949, and provides that:

> "By virtue of the authority vested in the President and pursuant to Executive Order No. 9337 of April 24, 1943, 3 CFR 1943 Cum. Supp., and section 4 of the act of May 24, 1928, 45 Stat. 729 (49 U.S.C. 214), it is ordered as follows:
>
> * * *
>
> "Subject to valid existing rights and withdrawals, the public lands within the following-described areas are hereby withdrawn from all forms of appropriation under the public land laws, including the mining and mineral-leasing laws, and reserved as follows:
>
> * * *
>
> "(5) Under the jurisdiction of the Secretary of the Interior pending relocation of a portion of the Anchorage-Seward highway:
>
> "Beginning at the southeast corner of sec. 33, T. 12 N., R. 3 W., S.M., thence by metes and bounds,
>
> "Southeasterly, 10 miles, parallel to and 1 mile distant from the line of mean high tide of Turnagain Arm, to the west boundary of Chugach National Forest;
>
> "South, 1 mile, along west boundary of the Forest to the line of mean high tide of Turnagain Arm;
>
> "Northwesterly, 11 miles along line of mean high tide of Turnagain Arm to meander corner on south boundary of sec. 32, T. 12 N., R. 3 W.,
>
> "East, 1¼ miles along south boundary of secs. 32 and 33 to point of beginning.
>
> "The area described contains approximately 6,700 acres."

The appellants contend, in identical statements of reasons, (1) that the land included in their notices of location is not within the boundaries of Public Land Order No. 576; (2)

that Public Land Order No. 576 is not based upon any valid statutory authority, and is therefore null and void; and (3) that by submitting final proof they have "an equitable right to the land and, in the absence of fraud or other legal reasons for invalidating final proof, [are] entitled to patent." It is also argued that the Land Office "in accepting the entryman's final proof, is estopped from denying the validity of, or rejecting the location notice filed herein."

I

Whether or not the land embraced in the appellants' homestead applications has been withdrawn from entry by Public Land Order 576 depends upon the location of the "line of mean high tide," which is the western boundary of the withdrawn area. The eastern boundary is a line parallel to and one mile distant from the western boundary. The appellants maintain that it has already been settled, in the case of *Thomas N. Mely*, Anchorage 015927, decided by the Acting Manager of the Anchorage Land Office on September 3, 1953, that the land for which they have applied is not within the withdrawn area. Although the history of the *Mely* case is involved, and sometimes confused, it must be reviewed here in order to determine its applicability in the instant case.

In May, 1949, Mr. Mely settled on a tract of land in the general area of the withdrawal, and in 1950 he filed a petition for free survey of his homestead. The Anchorage Land Office then attempted to determine whether or not his claim was within the reserved area.

Turnagain Arm, the western boundary of the withdrawal, is a branch of Cook Inlet, which in turn is a branch of the Gulf of Alaska. In the vicinity of the withdrawn area, there stretches, between what is definitely the upland, and what is definitely the line of low tide, a wide expanse of extremely level mud flats. This area is so nearly horizontal, and so large, that the raising of the level of the water by only a fraction of an inch is sufficient to inundate several hundred acres. Conversely, the slightest lowering of the water's level exposes a large area of mud flats.

When the question of establishing the line of mean high tide was raised, Mr. Mely contended that that line was actually some distance out on the mud flats, and that the land on which he had settled was not within one mile of the line of mean high tide, and consequently not within the withdrawn area. Two hearings were held; at each hearing, a cadastral engineer, who was then in the process of surveying the area for the Bureau of Land Management, testified as to the location of the line of mean high tide.

Although the transcript of the second hearing is not available, it appears that the testimony of the cadastral engineer in that hearing was substantially different from his testimony in the first. Also, at the second hearing, Mr. Mely submitted in evidence a report by Mr. Victor C. Rivers, a registered engineer, to the effect that the Department of the Interior's concepts as to the location of the line of mean high tide are not scientifically precise, and that his own observations showed the line of mean high tide to be a considerable distance out on the mud flats. Accordingly, Mr. Rivers concluded that the Mely homestead was not within one mile of the line of mean high tide, and thus not affected by the withdrawal.

This position prevailed and, although the petition for free survey was rejected, the Acting Manager found that Mr. Mely's homestead was not within the withdrawan area. Subsequently the official survey was completed by the cadastral engineer who had testified at the hearing; the plat of survey was accepted and filed, and patent issued to Mr. Mely. Also, on the basis of the Mely decision, patent has issued to Mr. Louis Oelschlaeger (the father of Richard, the appellant in this case), whose homestead is located immediately east of the Mely homestead. The appellants argue that since the Mely homestead was found not to be within the withdrawn area, their own proposed homesteads which, like the Louis Oelschlaeger homestead, are east of the Mely homestead, must also be outside the ambit of the public land order.

However, the decision in the *Mely* case is not applicable in the situation presented by the instant appeals. At the time of the Mely hearing, the area had not been surveyed. The purpose of the hearing was to determine whether the Mely homestead was within the withdrawn area. Had the land been surveyed, this would already have been known. Since the time of the Mely hearing, the area has been surveyed, and the proposed homesteads of both appellants (as well as the patented homestead of Mr. Mely) have been found to be on withdrawn lands. The Manager's refusal to allow the homestead entries on this land was therefore correct.

It appears that in reaching a decision in the *Mely* case, where it was held that a homestead entry in the same area was *not* on withdrawn land, the Acting Manager considered *Borax Consolidated Ltd. v. Los Angeles,* 296 U.S. 10 (1935) to be controlling. It is now argued that the *Borax* case governs here, also, and requires the approval of the appellants' homestead applications.

The *Borax* case was an action by the City of Los Angeles to quiet title to what was claimed to be the tideland of an island in Los Angeles Harbor. The area in dispute was composed of mud flats, "the surface of which is in place almost horizontal, and in other places the place of the surface forms a very acute angle with the horizontal so the small additional rise of the tide will result in the flooding of a large area of ground." These mud flats were very valuable; as much as $49,000 per acre had been paid for land on the island.

The island had been surveyed in 1880, after the admission of California into the Union, and patented in 1881 to one William Banning, to whom Borax Consolidated traced its title. The District Court held that since none of the land involved in the suit was shown on the plat of survey to have been tideland, or below the line of mean high tide of the Pacific Ocean, or Los Angeles Harbor, and that, since the action of the General Land Office involved determinations of questions of fact that were within its jurisdiction and

were especially committed to it by law for decision, its determinations, including that of the correctness of the survey, were final and were binding upon the State of California and the City of Los Angeles, as well as upon the United States. The Court of Appeals reversed the District Court, and the Supreme Court affirmed the action of the Court of Appeals.

The Supreme Court held that the question of whether land is tideland, and thus under the jurisdiction of a State, or upland, and thus under the jurisdiction of the Federal Government, is appropriately one for judicial decision upon the evidence. The Court stated that although the boundary of the upland is the high water mark, that term "does not mean, as petitioners contend, a physical mark made upon the ground by the waters; it means the line of high water as determined by the course of the tides." The Court went on to define the mean high tide line as "neither the spring tide nor the neap tide, but a mean of all the high tides," and then concluded:

> "In view of the definition of the mean high tide, as given by the United States Coast and Geodetic Survey, that 'Mean high water at any place is the average height of all the high waters at that place over a considerable period of time,' and the further observation that 'from theoretical considerations of an astronomical character' there should be 'a periodic variation in the rise of water above sea level having a period of 18.6 years,' the Court of Appeals directed that in order to ascertain the mean high tide line with requisite certainty in fixing the boundary of valuable tidelands, such as those here in question appear to be, 'an average of 18.6 years should be determined as near as possible.' We find no error in that instruction."

The appellants have relied heavily on the manner of determining "mean high tide" used by the Coast and Geodetic Survey and recommended by the Supreme Court, and have argued that the failure of the Bureau of Land Management

to determine mean high tide in this same manner necessarily indicates that the Bureau's line of mean high tide has been incorrectly ascertained.

However, it is not the function of this Bureau to determine lines of mean high tide, *per se.* This Bureau is by statute charged with the duty of surveying the public lands of the United States. 43 U.S.C., 1952 ed., sec. 2. The Bureau's survey of public lands does not ascertain boundaries, but creates them. *Cox v. Hart,* 260 U.S. 427, 436 (1922).

Surveys creating, reestablishing, marking, and defining boundaries are called cadastral surveys. Such surveys, unlike scientific surveys of an informative character which may be amended with changing conditions or because they are not executed according to the standards now required for accuracy, cannot be ignored, repudiated, altered or corrected, and the boundaries created or reestablished cannot be changed so long as they control rights vested in the lands affected.[1]

The Coast and Geodetic Survey has a function different from that of the Cadastral engineers. Its work is to reduce to a common level, or datum plane, soundings taken at different stages of the tide; determine tidal datum planes for general engineering work; derive data for the prediction of the tides; secure information pertaining to the mean and extreme rise and fall of the tide which may be necessary in the construction of piers, bridges, and other structures for which the tidal condition is an important factor, and secure data for the study of crustal movements in the earth. The maps prepared by the Coast and Geodetic Survey reflect this information, and are of inestimable value to those who use them.

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[1] *Modern Cartography-- Base Maps for World Needs,* United Nations, 1944, p. 64.

[2] *Manual of Tide Observations,* U.S. Department of Commerce, Coast and Geodetic Survey, Washington, 1935, p. 1.

It is at once clear that the Bureau of Land Management and the Coast and Geodetic Survey work in different dimensions: the former establishes the boundaries of the public land; the latter measures the depths of the ocean.

Indeed, the difficulties presented by these appeals are quickly resolved when it is realized that the phrase "line of mean high tide" as used by the Department of the Interior has a meaning quite different from that same phrase as used by the Coast and Geodetic Survey, just as the surveys executed by the Department of the Interior serve a different purpose from those executed by the Coast and Geodetic Survey.

It is well settled that the power to make and correct surveys of the public lands is reposed in the political department of the Government, and that the "land department" is charged with the duty of surveying the public domain, and must necessarily determine what are public lands subject to survey and disposal under the public land laws. *Kirwan v. Murphy*, 189 U.S. 35, 53 (1902). The Supreme Court has called this an elementary principle of our land law, "settled by such a mass of decisions of this court that its mere statement is sufficient." *Cragin v. Powell*, 128 U.S. 691, 699 (1888). The reason for this is that "great confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done and divisions more equitably made than the department of public lands could do." *ibid.*

Within the "land department," or the Bureau of Land Management, as it is now called, it is the province of the Director to "consider and determine what are public lands, what have been surveyed, what are to be surveyed, what have been disposed of, and what are reserved. * * *"[3]

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[3] *Manual of Instructions for the Survey of the Public Lands of the United States*, Washington, 1947, p. 3.

The words "public lands of the United States" do not include all lands to which the United States may have legal title, or all lands that may be granted or disposed of by the United States, but are used to designate only such lands as are subject to sale and disposal under the general land laws. *Frank Burns,* 10 L.D. 365, 367 (1890). Upon its admission into the Union, the State of Alaska immediately acquired title to and jurisdiction over all lands within its limits below ordinary high water mark and such lands may not be disposed of by the Federal Government. Even before the admission of Alaska as a State, when the title to the tidelands was in the Federal Government, those tidelands were not subject to disposition under the general land laws; the title and dominion of the tide waters and the land under them were held by the United States for the benefit of the whole people, in trust for the future state. *Shively v. Bowlby,* 152 U.S. 1, 48 (1893). Hence, at the time the public land order was issued, and at the time the land here involved was surveyed, the tidelands of Alaska, although Government lands, were not "public lands." *Scrip Application for Submerged Coastal Lands,* M-36084 (June 25, 1951); *Mann v. Tacoma Land Co.,* 153 U.S. 273 (1894).

Since tidelands are not public lands, they are, of course, excluded from the surveys of the public lands. The meander line, which is the traverse of the margin of a permanent body of water, marks the limit of the Government survey. *Northern Pacific Railway Company et al.,* 62 I.D. 401, 405 (1955).

The outermost extent of the public land surveys—the proper place for running the meander line—has often been designated as the "limits of high water," or the "ordinary high water mark." *Barney v. Keokuk,* 94 U.S. 324, 338 (1876); *Frank Burns, supra,* 369. But, in the history of the Department of the Interior, many other phrases have also been used to designate the proper place for running the line. These phrases are discussed in the case of *Nome Transportation Company,* 29 L.D. 447, 449 (1900) where, apparently

for the first time, the phrase "line of mean high tide" came to the attention of the Department, in connection with an application, under section 6 of the Act of May 14, 1898 (30 Stat. 411) for a right of way "parallel to and eighty feet from the line of mean high tide" of Norton Sound, in Alaska.

The Secretary of the Interior requested an opinion as to whether or not the permit might issue; in his reply, the Assistant Attorney-General stated:

> "The statute authorizes the issuance of a permit for a right of way only 'over the public domain.' Tide lands are not a part of the 'public domain' within the meaning of that term as used in the statute (*Shively v. Bowlby*, 152 U.S. 1-58; *In re* James W. Logan, 29 L.D. 395). The term 'line of mean high tide,' as used in the application and accompanying survey and plat, may be of uncertain meaning. It is not the term usually employed to denote the inner boundary of tide lands. 'Lands under tide waters,' or 'below high water mark of tide waters,' 'lands flowed by the tide,' and other expressions of like import, are usually employed in defining what are tide lands (*Shively v. Bowlby, supra*). If by the words, 'line of mean high tide,' is meant 'high water mark,' or 'that part of the shore of the sea to which the waves ordinarily reach when the tide is at its highest,' or the line which is marked 'by the periodical flow of the tide, excluding the advance of waters above this mark by winds and storms and by freshets or floods,' or 'the line of ordinary high tide between the springs and neaps,' there is no uncertainty in the description or designation of the lateral lines of the right of way applied for. I am of the opinion that the words named were employed as the equivalent of the expressions quoted, but to avoid possible uncertainty in that respect it should be stated in any permit granted for this right of way that it is given upon the theory such words refer to that part of the shore of the sea to which the waves ordinarily reach when the tide is at its highest. If

> such words are otherwise employed in the application the proposed right of way may or may not embrace tide lands, depending upon the meaning intended."

In other words, the "line of mean high tide" is an acceptable designation for the boundary of the public domain if the term is synonymous with "high water mark," or "line of ordinary high tide between the spring and neaps," or other similar terms traditionally used to designate the inner boundaries of the tide lands.[4]

"Line of mean high tide" was thus not regarded in 1900 as a new phrase for a new concept—the boundary of the public lands as determined by some modern method—but rather as a new, and alternative phrase for an old concept: the boundary of the public lands as determined by long established practice. The displacement of one phrase by another did not, and was not intended to, reflect a change in what was designated.

This may be further demonstrated by the way in which the Congress has used these terms.

Section 2 of the Act of May 14, 1898, 30 Stat. 409, declared that:

> "nothing in this Act contained shall be construed as impairing in any degree the title of any State that may hereafter be erected out of said District [i.e., Alaska], or any part thereof, to tide lands and beds of any of its navigable waters, or the right of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be

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[4] In the Manual of Surveying Instructions then current, it was stated, "In the survey of lands bordering on *tide water*, 'meander corners' will be established at the points where surveyed lines intersect *high-water* mark, and the meanders will follow the *high-water line*." *Manual of Surveying Instructions*, Washington, 1894, p. 58.

> erected out of said District. The term "navigable waters," as herein used, shall be held to include all tidal waters up to the *line of ordinary high tide* and all nontidal waters navigable in fact up to the *line of ordinary high water mark.*" (Emphasis supplied.)

In 1957, the Senate, in connection with a bill authorizing the grant of certain tidelands to the Territory of Alaska, considered the statute of 1898, and stated in a report accompanying the 1957 bill:

> "By the act of May 14, 1898 (30 Stat. 409, 48 U.S.C. sec. 411), the tidelands in Alaska, defined as those lands lying between the *line of mean high tide* and the line of mean low tide, were reserved for the future state, and consequently they can be disposed of only at the direction of Congress." 1957 U.S. Code Cong. and Adm. News, 1933 (Emphasis supplied.)

Since the 1898 statute contains no reference to the phrase, "line of mean high tide," it is clear that the Senate, in its report, recognized the phrase "line of ordinary high tide" to be the equivalent of the phrase "line of mean high tide."

The 1957 bill itself, as enacted into law, is equally explicit on this point, and states that "* * * '*the line of mean high tide*' *shall mean the meander line as heretofore established by Government survey*, or, in the event that such a survey has not been made, the present line of mean high tide * * *." Act of September 7, 1957, 71 Stat. 623, 48 U.S.C., 1952 ed., Supp. V, sec. 455a (Emphasis supplied). In view of the fact that the meander line has always been located with reference to "high water mark," or "limits of high water," or "line of ordinary high tide," it is clear that Congress' equation of the "line of mean high tide" with the meander line is, in reality, an equation of "line of mean high tide" with "high water mark" or "line of ordinary high tide."

In deciding where to run the meander line, it is, and has been, the practice of cadastral engineers to study markings on the soil resulting from the action of the water. Generally,

a definite escarpment in the soil will be traceable, at the top of which is the true position for the engineer to run the meander line.[5] Also, the presence or absence of vegetation is noted as a guide to marking the boundary of the public domain. This is an especially significant factor because the ancient distinction between tideland and upland is that the upland is dry and maniorable, whereas the tidelands are, by definition, so regularly covered by the flow of water as to render them unfit for cultivation, the growth of grasses, or other to which the upland is applied. *San Francisco v. LeRoy,* 138 U.S. 656, 671 (1891); *Knight v. United States Land Association, supra; Shively v. Bowlby, supra.* This was recognized by the Court of Appeals which, in its decision in the *Borax* case, described mean high tide as the "line defining the boundary between the tillable uplands and the lands which were ordinarily submerged by the tides." *City of Los Angeles v. Borax Consolidated Limited et al.* 74 F.2d 901, 905 (1935).

This method of running meander lines has long been adhered to. Where an agency entrusted with the duty to survey the public lands has conducted a survey in conformity with principles developed over a period of 160 years, the methods used by that agency will prevail, within the agency, over techniques used by other Government agencies in conducting surveys in no way connected with the public land laws of the United States.

It must accordingly be concluded that the phrase, "line of mean high tide" has been used by the Department, and has been recognized by Congress, to signify that line which would be meandered by the cadastral engineer in accordance with the practices developed when that same line was designated by terms such as "line of ordinary high tide," "high water mark," "high water line," "that part of the shore of the sea to which the waves ordinarily reach when

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[5] *Manual of Instructions for the Survey of the Public Lands of the United States,* Washington, 1947, p. 231.

the tide is at its highest," and similar phrases. This is a meaning independent of and separate from any other meaning which may have accreted to the phrase.

The decision of the Supreme Court in the Borax case must, therefore, be limited in its application to the factual situation which gave rise to it; a dispute as to the exact boundary of very valuable lands no longer in the public domain. Although a meander line on an official plat of survey may be considered as delineating the seaward boundary of the public domain, a meander line is not as of course the boundary of land after it passes into private ownership. The actual water line, of which the meander line is, for the most part, only an approximation, is, no matter how much it may shift, the boundary, and a deed describing a lot by number or name conveys the land up to the shifting water line, exactly as it does up to a fixed line. *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 196 (1890); *Harvey M. LaFollette et al.*, 26 L.D. 453, 469 (1898).

In the *Borax* case, the Supreme Court did not hold that the survey, or method of survey, of the public domain by the Land Department in 1880 was incorrect; rather it set forth what it considered to be the proper procedure for determining the boundary, in 1935, of land in private ownership. It would be gratuitous to assume that the Supreme Court, in that decision, intended to "overthrow the public surveys on no other ground than they could have the work in the field better done." Since 1935, when the Borax case was decided, as before, the usual method of determining the littoral boundary of public lands has been to deduce it from the physical effect of the water's action upon the land, rather than by measuring the depth of the high tide over a period of 18.6 years.[6]

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[6] At the time of the hearing in the *Mely* case, a map, prepared by Mr. Rivers, the registered engineer, at the request of Mr. Mely, was submitted; on this map, the line of mean high tide was depicted as being far out on the mud flats. Mr. Rivers' observations, however, did not extend over a period of 18.6 years, but only over a period of 14 days in June, 1953.

The present appellants contend that "until such time as an accurate survey of the exact location of the line of mean high tide of Turnagain Arm reverses the decisions of the Mely and Lewis [sic] Oelschlaeger cases, clearly entrymen who establish their claims and complete their legal requirements with notice of, and in reliance upon, these earlier decisions, cannot be deprived of their rights by mere administrative fiat. To this extent it is submitted that the Government is estopped from denying the import of its own published decisions in the two precedent making cases."

But the answer to this, in the light of the foregoing discussion, is that the determination of the line of mean high tide, in the technical sense meant by the appellants, has no bearing upon the resolution of this case; although useful for certain purposes, it would not affect or establish the location of the boundary of the public lands. The phrase, "line of mean high tide" in a public land order, means only "boundary of the public land," or "meander line." Although a meander line does not delimit a private owner's holding (he owns to the water's edge), it does delimit what the land department has jurisdiction over, and may dispose of: the meander line is a means of ascertaining, in fractional portions of the public lands bordering on navigable waters, the quantity of land in the fraction subject to sale, which is to be paid for by the purchaser. *Railroad Company v. Schurmeir*, 74 U.S. 272, 286 (1868). The plat of survey is conclusive as to the acreage of land in legal subdivisions, and the land has to be sold on the basis of the acreage shown by the plat. *Scott K. Snively* (On Petition), 49 L.D. 583 (1923).

A withdrawal of lands for a specific use incompatible with their disposition under the public land laws is itself a disposition of lands; such lands become severed from the mass of public lands exactly as if they had been patented to an individual. Cf. *Loyal N. Massey, Leona Massey*, A-23861 (July 24, 1945). Just as the meander line on an official plat of survey is conclusive as to the area of land for which a

charge may be made when the land is sold, so is it conclusive as to the area of land included in a withdrawal. And, in like manner, where the starting point for measuring the width of a withdrawal, or any other distance which must be ascertained in connection with the administration and disposal of the public lands, is the littoral boundary of the public domain (whether it be called "line of mean high tide," or "high water mark," or any other phrase), the plat of survey is conclusive as to the location of the littoral boundary, and the location of the point from which the measurement must be made.

It was the purpose of Public Land Order 576 to withdraw a strip of *public land* one mile wide along the shore of Turnagain Arm. After the date of the Mely decision, the land surveyed, the seaward boundary of the public land established, and this boundary depicted as a meander line on the plat of survey. The plat of survey, when approved, became the official determination of the extent of the public lands, and it is binding on all agents of the Bureau. *Knight v. U.S. Land Association*, 142 U.S. 161, 177 (1891). This survey showed the lands applied for by Mr. Oelschlaeger and Mr. Pennington to be withdrawn. Their applications were therefore properly rejected. The factual situation of the *Mely* case, where the land was unsurveyed, and the limits of the withdrawal open to question, is not the factual situation of the instant cases, and the decision in the *Mely* case does not require a similar decision here.

Moreover, Mr. Pennington did not establish his claim with notice of, and in reliance upon, the decision in the *Mely* case, because the *Mely* case had not been decided at the time he filed his notice of location.[7] What, in the eyes of

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[7]Public Land Order 576 was published in the Federal Register on April 6, 1949; Mr. Pennington filed his notice of location on May 6, 1953; Mr. Oelschlaeger filed his notice of location on April 21, 1954; the decision favorable to Mr. Mely was promulgated on September 3, 1953, and patent was issued to him on April 27, 1955.

the law, both entryman did have notice of, at the time they attempted to initiate their claims, was the fact that the area was withdrawn: the publication of a document in the Federal Register operates as constructive notice of the contents of the document to any person subject thereto or affected thereby. 44 U.S.C., 1952 ed., sec. 307.

Since the appellants' proposed homesteads are within an area which was, before they initiated their claims, withdrawn from all forms of entry by Public Land Order 576, their notices of location, homestead applications, and offers of final proof must be rejected.

II

It is argued that Public Land Order 576 is invalid. The appellants contend that the land order cites as its authority Section 4 of the Act of May 24, 1928 (49 U.S.C., 1952 ed., sec. 214) and Executive Order No. 9337 of April 24, 1943. The Act of 1928 authorizes the Secretary of the Interior to establish beacon lights and other air navigation facilities and therefore cannot, the appellants maintain, authorize the withdrawal of land for the relocation of a highway. However, Public Land Order 576 is quite extensive, and the Act of 1928 is the authority merely for one portion of the order—paragraph(2)—which does involve air navigation facilities.

The greater part of the order was issued under the authority of Executive Order 9337, which reads in part:

> "By virtue of the authority vested in me by the Act of June 25, 1910, Ch. 421, 36 Stat. 847, and as President of the United States, it is ordered as follows:
>
> "Section 1. The Secretary of the Interior is hereby authorized to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States to the same extent that such lands might be withdrawn or reserved by the President, and also, to the same extent, to modify or revoke withdrawals or reservations of such lands. . . ."

The appellants state that "Title 43 of the Code of Federal Regulations contains only two references to the statutory authority under which this Executive Order was issued, one of which has to do with 43 U.S.C. 711 (withdrawal for townsite purposes) and the other with the Act of June 1, 1938, 52 Stat. 609, as amended (43 U.S.C. 682A) which is the Act pertaining to the lease or sale of small tracts. Neither of these statutes appear to be applicable."

However, in the Code of Federal Regulations, Executive Order 9337 is mentioned but briefly in connection with the townsite and small tract laws: land reserved pursuant to this Executive Order (which has since been superseded by Executive Order 10355 [17 F.R. 4831; 3 CFR, 1952 Supp.]) may be disposed of under the townsite laws (43 CFR 255.1) but not under the small tract laws (43 CFR 257.1).

It is clear that Executive Order 9337 was not issued under the authority of the townsite or small tract statutes, but merely limits the lands to which one of those statutes may be applied. The authority to issue the Order is based upon inherent powers possessed by the President and delegated to the Secretary of the Interior. The withdrawal by the Secretary has the same effect, and validity, as a withdrawal by the President himself. Cf. *Wilbur v. United States*, 46 F.2d 217 (1930); *Authority of the Secretary of the Interior to Withdraw Public Lands*, M-36144 (August 4, 1952). The Secretary's power to make withdrawals, like the President's, is broad enough to include reservations for highway purposes.

The appellants further assert that if the authority for the withdrawal exists, the reason does not. Public Land Order 576 reserved the one mile strip "pending relocation of the Anchorage Seward Highway." The appellants state that the relocation was completed in 1947, 16 months before the order of withdrawal. The letter from the Alaska Bureau of Public Roads, submitted by the appellants to establish this fact, makes it clear that it was merely the *survey* which was completed in 1947; according to records in the Office

of Territories, Department of the Interior, Washington, D.C., the actual construction of the highway was not completed until 1952, although work had advanced sufficiently for it to be opened to traffic in 1951. There is no reason to assume that the completion of the survey for the highway made the withdrawal unnecessary.

Nor can it be successfully argued that the language of the withdrawal, as originally published in the Federal Register, was too vague to permit anyone to establish its extent. Since the land was unsurveyed at the time of the withdrawal, it could be described only by metes and bounds. The most natural and convenient way to describe a littoral tract is to state that it is bounded on one side by the ocean, and, of course, the words, "Turnagain Arm" or "the shore of Turnagain Arm" could have been used to describe the western boundary of the withdrawal. But this would not have obviated the difficulty which has arisen: by the common law, the shore of the sea, and, of course, of the arms of the sea, is the land between ordinary high and low water mark—the land over which the daily tides ebb and flow. When, therefore, the sea or bay is named as a boundary, the line of ordinary high water mark is always intended where the common law prevails. *United States v. Thomas Pacheco et al.*, 69 U.S. 587 (1865). And as has been shown, "line of mean high tide," when used in connection with the public lands of the United States, is merely a synonym for "line of ordinary high water mark." Thus, the language used to describe the western boundary of the withdrawal was as precise as was possible in a metes and bounds description.

This method of describing unsurveyed withdrawn lands has for precedent Section 10 of the Act of May 14, 1898, *supra*, which provides that a "roadway sixty feet in width, parallel to the shore line as near as may be practicable, shall be reserved for the use of the public as a highway * * *". "Shore line" was construed by the Department to mean "high water line." *Regulations Concerning Homesteads, Rights-of-Way, Timber, etc., in Alaska*, 27 L.D. 248, 264

(1898). There is no record of this description of the withdrawn area ever having been found to be so vague as to forbid the application of the statute.

Furthermore, in the instant cases, after the lands were surveyed, a legal description of the withdrawn area was published in the Federal Register. This did not deprive the appellants of their rights by mere administrative fiat; rather, it established with greater precision what had been clear before, that, within this certain area, no rights could be initiated.

Accordingly, there can be no doubt as to the authority for the withdrawal, the reason for it, or its effectiveness in giving notice that the land in question was withdrawn from settlement.

III

The appellants also contend that since their notices of location, applications for homestead entries, and final proof offers were accepted by the Land Office, they have equitable title to the land, and are entitled to receive legal title. This argument is without merit for the simple reason that the land being withdrawn was not available for homestead entry either on the date of the settlement on the land, or on the date the homestead applications were filed. No rights can be secured under the homestead laws to lands reserved by competent authority from settlement and entry until the lands are made available for entry.

The Manager, in this case, did not accept the appellants' applications and final proof in the sense that he approved them; the Manager merely received the applications, as he is required to do. When he finally acted upon the notices of location, applications, and final proof, he rejected them, because the land was withdrawn from homestead entry. Even if an official of the Bureau of Land Management had purported to authorize the appellants to enter the land prior to its restoration to entry, such authorization would have conferred no rights on the appellants. *Arthur Halsted*, A-27298 (May 21, 1956).

Since the appellants' proposed homesteads are within a withdrawn area, and since their settlements on the land were made subsequent to the withdrawal, their claims are, on their face, as a matter of law, invalid, and there is no requirement that a hearing be held in this matter. *Clear Gravel Enterprises, Inc.*, 64 I.D. 210 (1957).

This result is not changed by the fact that some of the land withdrawn by Public Land Order 576 has been restored to entry by Public Land Order 1654 (23 F.R. 4411), June 19, 1958). It is well settled that no rights are acquired by an application to enter land if the land sought is withdrawn from entry at the time the application is filed, and it is equally well settled that no rights accrue to an applicant if, pending an appeal by him from the rejection of his application for such a reason, the land is restored to entry. *Roy Leonard Wilbur, Robert Montgomery Tubb*, 61 I.D. 157 (1953).

The decisions of the Manager rejecting the appellants' notices of location, applications to enter, and final proof, are therefore affirmed. This action is without prejudice to the right of the appellants to submit new applications for the same land, if the land is now open to entry. The appellants will not be entitled to a preference right to enter by virtue of their settlement on the land at a time when it was withdrawn from entry.

Mr. Pennington and Mr. Oelschlaeger are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosure Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

/s/ Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. Robert O. Pennington (Regular Mail)
Mr. Richard L. Oelschlaeger (Regular Mail)
Mr. Edgar Paul Boyko, Attorney (Certified Mail)
Mr. S. J. Buckalew, Jr., Attorney (Certified Mail)
Hon. E. L. Bartlett, U.S. Senate, Washington 25, D.C.
Lands Staff Officer
Appeals List No. 1
Cadastral Engineering Staff Officer (2)
MG

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Land Office
Anchorage, Alaska

Certified Mail
Return Receipt Requested

DECISION NOV 19 1956

Richard L. Oelschlaeger	:	Anchorage 026482
c/o Edgar Paul Boyko, Atty.	:	Homestead 1.0
523 Third Avenue	:	
Anchorage, Alaska	:	

Homestead Location Notice, Application to Enter, and Final Proof Rejected

On April 21, 1954, Richard L. Oelschlaeger filed a notice of location of homestead settlement claim describing the land as, what will be when surveyed, the W½SE¼SW¼, Section 3, and the E½NW¼, Sec. 10, T. 11 N., R. 3 W., Seward Meridian.

On March 29, 1949, the land mentioned above was withdrawn from all forms of appropriation under the public land-laws for public purposes by Public Land Order No. 576. The location notice was never accepted by the Land Office, since a status check disclosed that it was impossible to determine the boundaries of Public Land Order No. 576 until the land had been surveyed and a determination and adjustment made of the boundaries of the withdrawal to line of legal subdivision of the plat. Such a determination was made November 8, 1954, in accordance with Department of the Interior regulations (42 L.D. 318), by the Director, Bureau of Land Management, Washington, D. C., and in accordance with this determination the lands applied for fall within the boundaries of Public Land Order No. 576, and are not open to entry.

The plat of survey was officially filed December 22, 1954, and, in accordance with prescribed procedure, Mr. Oelschlaeger was advised of the filing of the plat and that a homestead entry application should be filed for surveyed land. The homestead entry application was filed January 31, 1955, and to date no notice of allowance has been issued.

Mr. Oelschlaeger was never notified that the land was open to settlement or entry. He and his Father, who had an adjoining homestead, were advised verbally at the Land Office on several occasions of this conflict and that settlement was at their own risk. Since no valid rights to land can be acquired while in a withdrawn status, the location notice is hereby rejected. (Anne V. Hestnes, A-27096, June 27, 1955; Rafael D. Tobar, A-27008, December 13, 1954).

Also, since a homestead entry must be rejected if the land applied for is reserved from entry when the application is filed, and cannot be suspended pending re-opening of the land to entry, the homestead application of Oelschlaeger is rejected together with his final proof.

Fees and commissions will be returned by separate voucher.

This decision may be appealed to the Director of the Bureau of Land Management in accordance with the regulations (43 CFR 221), pertinent parts of which are attached. A Notice of Appeal which is filed in this office more than thirty (30) days after your receipt of the decision, or which though timely filed is not accompanied by a $5.00 filing fee, will not be considered.

/s/ Virgil O. Seiser
Manager

Enclosure: Info. Sheet on Appeals
Richard L. Oelschlaeger
c/o Edgar Paul Boyko, Atty.
Decision

NOV 19 1956

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,127

STEWART L. UDALL,
SECRETARY OF THE INTERIOR, AND
KARL E. LANDSTROM,
DIRECTOR, BUREAU OF LAND MANAGEMENT,
Appellants,

v.

RICHARD L. OELSCHLAEGER,
Appellee.

Appeal from the United States District Court
for the District of Columbia

Decided January 23, 1968

Mr. John G. Gill, Jr., Attorney, Department of Justice, with whom *Assistant Attorney General Edwin L. Weisl, Jr.*, *Acting Assistant Attorney General Williams* and *Mr. Roger P. Marquis*, Attorney, Department of Justice, were on the brief, for appellants.

Mr. James W. McDade, with whom *Mr. Samuel W. McIntosh* was on the brief, for appellee.

Before BURGER, WRIGHT and MCGOWAN, *Circuit Judges.*

MCGOWAN, *Circuit Judge:* Appellee sued in the District Court to compel the issuance to him of a final certificate and patent with respect to a homestead upon which he had

made entry. The District Court, hearing the case on cross-motions for summary judgment, denied both without opinion, but remanded the case to the Interior Department on terms which in substance gave appellee the relief he sought. Appellants assert upon this appeal that neither of the two possible foundations of the District Court's action are adequate. We agree.

I

The land in question is in Alaska, lying near the seacoast. It was settled by appellee in 1954, prior to the filing later in that year of the Government's first official survey of the area in which the land lies. Appellee's final proofs of entry were filed in mid-1955. On November 19, 1956, his application for final patent was turned down by the Anchorage Land Office on the ground that the land in question had been withdrawn from entry by Public Land Order 576, which had been issued by the Secretary of the Interior in 1949. Two administrative appeals to successively higher authority within the Department were unavailing.

In those appeals the principal issue was the proper construction to be placed upon the language of Public Land Order 576. It purported to withdraw from appropriation under the public land laws an 11-mile area "parallel to and one mile distant from the line of mean high tide of Turnagain Arm." Turnagain Arm is an inlet of the ocean. The Interior Department construed "the line of mean high tide" to mean the surveyor's meander line.[1] Appellee insisted that the phrase embodied a concept identified by the Supreme Court in *Borax, Ltd. v. Los Angeles,* 296 U.S. 10 (1935), that is to say, the precise average of all the high

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[1] The Government in its brief has adequately described a meander line as "a series of straight lines run by a surveyor along the physical evidence of the high tide, the escarpment and edge of vegetation, wherever the public lands meet a navigable body of water."

tides over a complete lunar cycle (18½ years) as determined by the United States Coast and Geodetic Survey. Although this latter line has not as yet been determined, and cannot be for some time yet because a lunar cycle has not been completed, appellants assume for present purposes only that all of the land claimed by appellee lies beyond the one-mile strip as measured from such a line. If the meander line is used, however, the homestead lies in the withdrawn area.

Appellee filed suit in 1960. Once dismissed for lack of prosecution but reinstated, the action finally reached trial in February, 1967. The District Court remanded the matter to the Department with directions that the so-called *Borax* line, as contended for by appellee, be used in determining whether the homestead was or was not within the area withdrawn by Public Land Order 576.

II

The central issue is that of the rationality of the construction placed by the Interior Department upon its own order. We must of necessity approach that issue in an acute consciousness of the Supreme Court's recent reminder of the deference due the Secretary's reading of his own words. *Udall v. Tallman*, 380 U.S. 1 (1965). Although one may wonder on occasion whether that doctrine encourages the kind of careful draftsmanship which might obtain in its absence, it does serve other important public purposes. In any event, it is, as we recently said in *Robertson v. Udall*, 121 U.S.App.D.C. 218, 221, 349 F.2d 195, 198 (1965), "[O]ur duty to defer to the Secretary's interpretation of his own regulations, so long as that interpretation is not plainly beyond the bounds of reason or authority, is well defined. . . ." See also *Duesing v. Udall*, 121 U.S.App.D.C. 370, 374, 350 F.2d 748, 752, *cert. denied*, 383 U.S. 912 (1965).

The question for us, therefore, as it was for the District Court, is not whether plausible grounds can be advanced for each of the contending constructions, but whether the one espoused by the Secretary is beyond the bounds of rea-

sonableness. If it is not, his view prevails, even though appellee's arguments are not without substance. This precedence derives from the rights which appropriately go with the great official responsibilities inherent in the administration of the public lands. We recognize them here.

Appellants have advanced a number of considerations which they regard as providing a more than ample underpinning of rationality for the Departmental construction. We do not think it necessary to advert to them all, since one alone seems to us sufficient to turn aside a claim of utter arbitrariness. The problems giving rise to this litigation have their origin mainly in the fact that, when Public Land Order 576 was issued and when appellee made his entry, the area involved had not been officially surveyed. Accurate demarcation of any property interests in the area could, accordingly, be made only after an official plat was forthcoming. The land area just to the north had, however, been surveyed, and points on that survey were used to define the area to be withdrawn. Thus it was that Public Land Order 576 described one of the boundaries of the withdrawn area in this fashion:

> Northwesterly, 11 miles along line of mean high tide of Turnagain Arm to meander corner on south boundary of section 32, T.12 N., R. 3W.

This reference to "meander corner" is, we think, significant. It is a point where a boundary line intersects a meanderable body of water; and it provides a normal point of departure for a new meander line. Since the area to the north had been surveyed by the running of a meander line on its seaward side, the use of the base point of the "meander corner" suggests that the withdrawal order contemplated a continuance of the meander line down the coast to the south. Had a *Borax* line been intended, it would in all certainty have been substantially off the "meander corner," whereas the quoted language appears to assume that the "line of mean high tide" will intersect that "corner." References to other platted points in the withdrawal order, when considered in relation to the one-mile distance involved,

also dovetail with the meander line of vegetation rather than with a line computed from tidal averages.

There is, of course, no question but that the Supreme Court in *Borax* referred to a line of this latter nature in the very terms used in Public Land Order 576, that is to say, as a "line of mean high tide." But the issue here is not whether there is such a concept, but whether that concept was intended to be reflected in those words as they appear in the withdrawal order. *Borax* does not govern this issue, since it was concerned with vastly different matters, *i.e.*, the determination of boundaries as between tideland owners, on the one hand, and upland owners, on the other. The fact that the Court decided to utilize the tidal average concept to resolve this ownership dispute does not conclude the issue of language construction presented to us by a private claim against the public domain.

III

Although we have no way of knowing whether the District Court responded affirmatively to it, an estoppel argument was pressed in that court and is renewed upon appeal. It rests upon the circumstance that in September, 1953, two final homestead patents were issued to other persons covering lands in the area which appellants now insist was withdrawn by the 1949 order. Appellee contends that appellants, having done for others what they now say they can not do for appellee, are estopped from denying appellee his patent.

Apart from the general rule that the Government is never disabled from protecting the public interest by reason of the past mistakes of its agents (see *Utah Power and Light Co. v. United States,* 243 U.S. 389 (1916)), we do not think a true estoppel is to be found in this record. In the first place there is no showing that appellee acted in reliance upon these or other acts of the Government, and, indeed, the record indicates that appellee was warned that he could not be sure that he was outside the withdrawn strip. Secondly, the issuance of the two patents occurred before the official survey was made, and before anyone could tell with

certainty where the withdrawn area was. It may have been improvident for these patents to have issued (and appellants freely characterize it as mistaken); but their issuance could not under the circumstances be taken as any express or implicit representation as to the location of the reserved lands. The fact is that, until the survey was made, Government and homesteader alike acted at their peril in issuing or seeking homesteads in this vicinity.

The judgment appealed from is reversed, and the case is remanded with directions to enter judgment for appellants.

It is so ordered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD L. OELSCHLAEGER,

Plaintiff,

v. Civil Action No. 4181-60

STEWART L. UDALL, et al.

Defendants.

ORDER

The above cause having been argued before the Court on the 14th day of February, 1967, on Motion for Summary Judgment filed by Plaintiff, and Cross-motion for Summary Judgment filed by Defendant, it is by the Court this 4th day of April, 1967,

ADJUDGED, ORDERED and DECREED:

(1) Plaintiff's Motion for Summary Judgment is denied; and

(2) Defendant's Cross-motion for Summary Judgment is denied; and

(3) The cause is remanded to the Department of the Interior with instructions that a determination of the line of mean high tide be made in accordance with the method stated in *Borax, Ltd. v. Los Angeles*, 296 U.S. 10; and

(4) For a further determination of the extent of the withdrawn area as it may be applicable to the lands embraced in Plaintiff's homestead entry, by measuring the said withdrawn area from the line of mean high tide as determined above; and

(5) For an administrative adjudication of Plaintiff's homestead entry in accordance with the above determinations.

/s/ Burnita Shelton Matthews
JUDGE

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1354

RICHARD L. OELSCHLAEGER, PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 33-38) is reported at 389 F.2d 974. The district court wrote no opinion, but issued an order (Pet. App. 39) which is not reported.

JURISDICTION

The opinion of the court of appeals was filed on January 23, 1968. The petition for a writ of certio-

rari was filed on April 22, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals committed reversible error in holding that the Secretary of the Interior was reasonable in defining what land was withdrawn from entry by Public Land Order 576.

REGULATION INVOLVED

Public Land Order 576 of April 6, 1949, 14 Fed. Reg. 1614, reads in pertinent part as follows:

> By virtue of the authority vested in the President and pursuant to Executive Order No. 9337 of April 24, 1943 [3 C.F.R. 1943 Cum. Supp.], and section 4 of the Act of May 24, 1928, 45 Stat. 729 (49 U.S.C. 214), it is ordered as follows:
>
> * * * *
>
> Subject to valid existing rights and withdrawals, the public lands within the following-described areas are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining and mineral-leasing laws, and reserved as follows:
>
> * * * *
>
> (5) Under the jurisdiction of the Secretary of the Interior pending relocation of a portion of the Anchorage-Seward highway:
>
> Beginning at the southeast corner of sec. 33, T. 12 N., R. 3 W., S.M., thence by metes and bounds,

Southeasterly, 10 miles, parallel to and 1 mile distant from the line of mean high tide of Turnagain Arm, to the west boundary of Chugach National Forest;

South, 1 mile, along west boundary of the Forest to the line of mean high tide of Turnagain Arm;

Northwesterly, 11 miles along line of mean high tide of Turnagain Arm to meander corner on south boundary of sec. 32, T. 12 N., R. 3 W.,

East, 1¼ miles along south boundary of secs. 32 and 33 to point of beginning.

The area described contains approximately 6,700 acres.

* * * *

STATEMENT

In 1954, prior to the filing later that year of the Government's first official survey, petitioner settled on certain land along Turnagain Arm in Alaska in an attempt to initiate a homestead claim. In 1956, his application for final patent was rejected by the Anchorage Land Office on the ground that the land had been withdrawn from entry by Public Land Order 576, issued in 1949 and withdrawing from entry a strip of land "parallel to and 1 mile distant from the line of mean high tide of Turnagain Arm" for the purpose of highway relocation (*supra;* Pet. App. 31-32).

In two administrative appeals, the Land Office decision was upheld on the ground that the surveyor's meander line was intended as the seaward boundary of the withdrawal and a one-mile-wide area measured from this line conflicted with the area claimed (Pet.

App. 1-7, 9-25). Petitioner sought judicial review, arguing in the district court, as he did before the Secretary, that the Land Order intended a seaward boundary as defined in *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10.[1] Accepting this argument, the district court ordered a determination based on the *Borax* line (Pet. App. 39).

Thereafter, the United States Court of Appeals for the District of Columbia Circuit reversed on the grounds that the Secretary's determination was reasonable, and that the *Borax* case did not govern the issue presented by the facts (Pet. App. 33-38).

ARGUMENT

Contrary to petitioner's assertions (Pet. 9-12), the decision below in no way conflicts with this Court's holding in *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10. That case concerned the extent of ownership rights conveyed by federal patents to lands adjacent to tidelands. The Court there held that while such federal patents are administratively described as being bounded by the surveyor's meander line, they carry with them ownership rights extending beyond that line to the true average of the high tides. In this case, however, there is no issue of the extent of ownership because all of the land was owned by the United States in 1949. The issue, instead, is what line was utilized in a Public Land Order which withdrew certain pub-

[1] Because of low-lying level mud flats and a great variance in the rise and fall of the tide in this area, the homestead sought probably lies one mile beyond this line (see Pet. App. 35).

lic land from entry and which was issued prior to the drawing of a meander line by survey. This distinction was the basis of both the rejection of petitioner's *Borax* line arguments in the administrative decisions (Pet. App. 4-5, 22-23) and the holding of the court of appeals that "*Borax* does not govern this issue, since it was concerned with vastly different matters, * * *" (Pet. App. 37).

In upholding the Secretary's construction of P.L.O. 576, the court of appeals found it necessary to consider only that his interpretation was consistent with other aspects on the face of the 1949 order (i.e., the "meander corner" reference and distance from "other platted points"), and that the only proposed alternative, the *Borax* line, was inconsistent with these aspects (Pet. App. 36). In these circumstances, the Secretary's decision was clearly correct and did not require elaboration. Hence, petitioner's arguments and authorities to the effect that grounds not relied upon by the adminstrative agency may not be invoked to validate the decision under review (Pet. 13-18) are inapplicable. *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 246-248.

Similarly, petitioner's assertions that due process has been violated (Pet. 19-23) are unfounded. A trial-type administrative hearing is not required when, as here, no facts are in dispute[2] and only the construction of a regulation is at issue. See *Federal Power Commission* v. *Texaco, Inc.*, 377 U.S. 33, 39-

[2] A stipulation in the district court (J.A. 13) eliminated from the case the only possible factual issue, i.e., whether the land was located within one mile of the meander line.

44. The issue presented was "a straightforward legal one". *Gardner* v. *Toilet Goods Assn.*, 387 U.S. 167, 170. See, also, *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149. Petitioner therefore was fully afforded his procedural rights when his written argument was received and considered at every stage of the administrative proceedings (see, *e.g.*, Pet. App. 4, 5, 14, 23, 26, 28).

Finally, the isolated importance of this case is another reason why further review by this Court is not warranted. It concerns only the effect on a single tract of land of a public land order which was superseded by P.L.O. 1654 (23 Fed. Reg. 4411) in 1958, using language different from that at issue here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

CLYDE O. MARTZ,
Assistant Attorney General.

ROGER P. MARQUIS,
JOHN G. GILL, JR.,
Attorneys.

MAY 1968.

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